Prangin Mall Sdn Bhd v Tang Joo Ming & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1920 OF 2011
RAUS SHARIF PCA, ABDUL WAHAB PATAIL JCA AND ROHANA YUSUF J
24 OCTOBER 2012

Contract — Agreement — Sale and purchase — Terms of agreement — Requirement for purchasers to pay maintenance charges — Collection of maintenance charges of mall — Failure to pay charges since 2004 — Claim for charges — Averment of failure to manage mall and misuse of management common properties in mall — Whether averment supported — Locus standi to initiate suit — Whether there was anything under law prohibiting claim for charges

The present appeal related to the right to collect maintenance charges and other outgoings from purchasers of parcels of a shopping complex known as Prangin Mall ('the mall') which was developed by Getaran Unggul Sdn Bhd ('the developer'). The appellant was appointed by the developer to maintain and manage the mall and the former was granted the latter's rights under the respective sale and purchase agreements ('SPA') entered into with purchasers of parcels in the mall. The respondents, as one of the purchasers, were required, under the SPA, to pay maintenance and service charges and an apportionment of insurance as well as quit rent ('the charges') to the appellant but failed to pay the charges since 2004. The appellant then proceeded to claim for the charges against the respondents amounting to a sum of RM58,093.34 at the sessions court. In its defence and counterclaim, the respondents raised the appellant's failure to manage the mall and misuse of the management common properties in the mall by setting up structures. The appellant applied for striking out of the respondents' defence and counterclaim. The application was allowed and judgment was entered against the respondents for the said sum of RM58,093.34. The respondents appealed against the said decision to the High Court but the appeal was discontinued. Instead, the respondents commenced an originating summons at the High Court, seeking for a declaration that the judgment of the sessions curt was null and void and liable to be set aside. It was allowed by the High Court. Dissatisfied, the appellant appealed against the said decision of the High Court and argued that the High Court had erred in its decision. The appellant contended that the issue of locus standi in respect of the appellant's capacity to initiate the suit at the sessions curt raised in this originating summons should not be allowed on the principle of res judicata or its more precise specie, issue estoppel. Next, the appellant submitted that it had the necessary locus standi to file the suit as the law did not prohibit the appellant from claiming for the charges as they were due and owing well before

the formation of joint management body ('JMB') under the Building and Common Property (Maintenance and Management) Act 2007 ('the Act'). A

Held, allowing appeal:

(1) The role and duties of the appellant ceased upon the formation the JMB but not more than that. The duty of the developer to carry out maintenance and management of the mall before the formation of the JMB was imposed by s 5(4) of the Act. It was therefore a legal duty imposed on the developer to carry out maintenance and management of the mall before the formation of JMB. Having imposed such a duty, the law was silent on the right to collect the charges by the developer. The developer's right to collect charges was one that was derived under the SPA and the amount owed by the respondents was expenses incurred by the developer prior to the formation of JMB. This contractual right to collect the charges under the SPA remained enforceable despite the obligation to manage and maintain the building ceased upon the formation of the JMB (see paras 9–10). B C D

(2) It became the duty of the JMB under s 8 of the Act to maintain the common property and keep it in a good serviceable repair. The JMB was empowered to collect, the maintenance and management charges from the owners, in proportion to the allocated share units of their respective parcels. It was also provided under s 22 of the Act that within one month of the formation of JMB, any amount standing surplus in the BMA would be transferred to the JMB. The monies so transferred would form part of the 'Building Maintenance Fund', which would be managed and maintained by the JMB (see para 12). E F

(3) A breach by the respondents to pay the charges under the SPA would entitle the parties to remedies under the contract. To deny the developer its contractual right under the SPA would lead to a situation where the developer is denied of any recourse. Although s 5(4) of the Act imposed a duty to maintain and manage, it did not specifically provide a corresponding right to collect the charges by the developer. Even though the duty to maintain and manage must necessarily imply the right to collect the charges, there was no clear provision for the same under the law. The court took judicial notice that the SPA was a contract sanctioned by law. It was an agreement made pursuant to reg 11 of the Housing Development (Control and Licensing) Regulations 1989. It would amount to an interference with freedom to contract (see para 16). G H

(4) Failure on the part of the purchasers to pay the charges to JMB was an offence under s 34 of the Act punishable with a fine not exceeding RM5,000 and should also be liable to a further fine not exceeding RM50,000 for every day during which the offence was continued after conviction. The power to collect the charges under the Act was a newly I

created right and only commenced upon formation of the JMB. It was distinct and different from the contractual right of developer under the SPA. Therefore, there was no 'handing over' of the developer's right to collect the charges (see para 17).

(5) There was no breach of statute by the sessions court when judgment was entered for the appellant. The only available avenue left to the respondents was by way of appeal to the High Court, which they had discontinued. It was also a rule that the withdrawal of appeal by the respondents of the sessions court order left nothing more for the court to adjudicate (see para 22).

[Bahasa Malaysia summary

Rayuan ini adalah berkenaan hak untuk memungut caj-caj penyenggaraan dan lain-lain belanja pasti daripada pembeli-pembeli bahagian-bahagian sebuah kompleks membeli-belah yang dikenali sebagai Prangin Mall ('pusat membeli-belah tersebut') yang dibangunkan oleh Getaran Unggul Sdn Bhd ('pemaju'). Perayu telah dilantik oleh pemaju untuk menyenggara dan menguruskan pusat membeli-belah tersebut dan perayu telah diberikan kebenaran oleh pemaju di bawah perjanjian jual beli ('PJB') yang dimeterai oleh pemaju-pemaju bahagian-bahagian pusat membeli belah tersebut. Responden-responden, antara pembeli-pembeli, diperlukan, di bawah PJB, untuk membayar caj penyenggaraan dan caj perkhidmatan dan sebahagian daripada insurans dan juga cukai tanah ('caj-caj tersebut') kepada perayu tetapi gagal berbuat sedemikian sejak tahun 2004. Perayu kemudiannya meneruskan dengan menuntut untuk caj-caj terhadap responden-responden jumlah sebanyak RM58,093.34 di mahkamah sesyen. Dalam pembelaan dan tuntutan balasnya, responden-responden membangkitkan kagagalan perayu untuk menguruskan pusat membeli belah tersebut dan penyalahgunaan pengurusan harta di pusat membeli belah tersebut dengan mendirikan struktur. Perayu kemudiannya memohon untuk mengenepikan pembelaan dan tuntutan balas responden-responden. Permohonan dibenarkan dan penghakiman dimasukkan terhadap responden-responden bagi jumlah RM58,093.34. Responden-responden merayu terhadap keputusan Mahkamah Tinggi tetapi rayuan tersebut tidak diteruskan. Sebaliknya, responden-responden memulakan saman pemula di Mahkamah Tinggi, memohon deklarasi bahawa penghakiman di mahkamah sesyen adalah batal dan tidak sah serta wajar diketepikan. Ia dibenarkan oleh Mahkamah Tinggi. Tidak berpuas hati, perayu merayu terhadap keputusan Mahkamah Tinggi dan menghujahkan bahawa Mahkamah Tinggi khilaf dalam keputusannya. Perayu menghujahkan bahawa isu locus standi berkenaan kapasiti perayu untuk memulakan guaman di Mahkamah Tinggi yang dibangkitkan dalam saman pemula ini tidak sewajarnya dibenarkan berdasarkan prinsip res judicata atau lebih tepat lagi, isu estopel. Seterusnya, perayu menghujahkan bahawa ia mempunyai locus standi yang diperlukan untuk memfailkan guaman ini kerana undang-undang tidak

menghalang perayu daripada menuntut caj-caj kerana kesemuanya perlu dibayar sebelum pembentukan badan pengurusan bersama ('BPB') di bawah Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('Akta'). A

Diputuskan, membenarkan rayuan: B

(1) Peranan dan kewajipan perayu terhenti dengan pembentukan BPB tetapi tidak lebih daripada itu. Tanggungjawab pemaju untuk menjalankan penyenggaraan dan pengurusan pusat membeli belah sebelum pembentukan BPB dikenakan oleh s 5(4) Akta. Oleh itu, ia adalah C kewajipan undang-undang yang dikenakan ke atas pemaju untuk menjalankan penyenggaraan dan pengurusan pusat membeli-belah sebelum pembentukan JMB. Dengan mengenakan tanggungjawab sedemikian, undang-undang tidak menyatakan hak untuk memungut caj-caj oleh pemaju. Hak pemaju untuk memungut caj-caj diperolehi D daripada PJB dan jumlah yang dihutang oleh responden-responden adalah perbelanjaan yang dikenakan oleh pemaju sebelum pembentukan BPB. Hak kontraktual untuk memungut caj-caj di bawah PJB kekal boleh dikuatkuasakan walaupun kewajipan untuk menguruskan dan menyenggara bangunan tersebut terhenti dengan pembentukan BPB E (lihat perenggan 9–10).

(2) Menjadi kewajipan BPB di bawah s 8 Akta untuk menyenggara harta bersama dan memastikannya dalam keadaan boleh guna. BPB mempunyai kuasa untuk memungut caj-caj penyenggaraan dan F pengurusan daripada pemilik-pemilik, selaras dengan unit-unit syer yang diperuntukkan bagi bahagian-bahagian mereka. Ia juga diperuntukkan di bawah s 22 Akta bahawa dalam satu bulan pembentukan BPB, sebarang jumlah lebihan dalam BMA akan dipindahkan kepada BPB. Wang yang dipindahkan akan membentuk bahagian 'Dana G Penyenggaraan Bangunan' yang akan diuruskan dan diselenggara oleh BPB (lihat perenggan 12).

(3) Satu pelanggaran oleh responden-responden untuk membayar caj-caj di bawah PJB akan memberikan hak kepada pihak-pihak bagi remedi di bawah kontrak. Untuk menafikan pemaju akan hak kontrak mereka di H bawah PJB akan membawa kepada keadaan yang mana pemaju dinafikan sebarang bantuan. Walaupun s 5(4) Akta mengenakan kewajipan untuk menyenggara dan menguruskan, ia tidak secara khusus memberikan hak yang sama untuk memungut caj-caj oleh pemaju. Walaupun kewajipan untuk mengekalkan dan menguruskan semestinya menandakan hak I untuk memungut caj, tiada peruntukan yang jelas untuk yang sama di bawah undang-undang. Mahkamah telah mengambil pengiktirafan kehakiman bahawa PJB adalah kontrak yang dibenarkan oleh undang-undang. Ia adalah satu perjanjian yang dibuat di bawah

peraturan 11 Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Ia akan terjumlah kepada campur tangan kebebasan untuk berkontrak (lihat perenggan 16).

(4) Kegagalan di pihak pembeli untuk membayar caj kepada BPB adalah satu kesalahan di bawah s 34 Akta yang boleh dihukum dengan denda tidak melebihi RM5,000 dan juga seharusnya dikenakan denda tambahan tidak melebihi RM50,000 bagi setiap hari kesalahan tersebut diteruskan selepas sabitan. Kuasa untuk memungut caj-caj di bawah Akta adalah hak yang baru diwujudkan dan hanya bermula dengan pembentukan BPB. Ia adalah asing dan berbeza daripada hak kontrak pemaju di bawah PJB. Oleh itu, tidak berlaku 'penyerahan' hak pemaju untuk memungut caj-caj (lihat perenggan 17).

(5) Tiada pelanggaran undang-undang oleh mahkamah sesyen apabila penghakiman dimasukkan bagi perayu. Cara lain yang tinggal untuk responden-responden adalah melalui rayuan kepada Mahkamah Tinggi, yang mana telah mereka hentikan. Ia juga merupakan peraturan bahawa penarikan balik rayuan oleh responden-responden terhadap perintah mahkamah sesyen tidak meninggalkan apa-apa yang lebih bagi mahkamah untuk mengadili (lihat perenggan 22).]

Notes

For a case on sale and purchase, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2991.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 ss 4(1)(4), 5(4), 8, 8(2), 16, 16(3), 17(1), 20, 20(2), 22, 22(1), 23(1), 34

Housing Development (Control and Licensing) Regulations 1989 reg 11

Appeal from: Originating Summons No 24–1249 of 2010 (High Court, Pulau Pinang)

D Kirubakaran (Kek Ooi & Lee Hong) for the appellant.
Rajivan (Sitham & Associates) for the respondent.

Rohana Yusuf J (delivering judgment of the court):

[1] This is an appeal relating to collection of maintenance charges in a

shopping complex called 'Prangin Mall', which was developed by a company known as 'Getaran Unggul Sdn Bhd' ('the developer'). By a management agreement and power of attorney dated 31 July 2007 ('management agreement'), the developer appointed the appellant to maintain and manage the mall. Pursuant to the said appointment the appellant was granted the developer's rights under the respective sale and purchase agreements entered into with purchasers of parcels in the mall. Of the more significant right granted under there under, which forms the subject matter of this proceeding, is the right to collect maintenance charges and other outgoings from the purchasers.

[2] The respondents were purchasers of the parcel known as No 4-57. Under the sale and purchase agreement with the developer (the sale and purchase agreement), the respondents were required to pay maintenance and service charges and an apportionment of insurance as well as quit rent (the charges) to the appellant. The respondents failed to pay the charges since 2004. As a result, the appellant filed a suit against the respondents at the sessions court for the sum of RM58,093.34; being the charges due and owing as at 19 November 2007. Particulars and accounts whereof were as follows:

(a) Maintenance/service charges (May 2004 – December 2007)	RM40,240.25
(b) Insurance premium (25 September 2004–31 December 2007)	RM189
(c) Quit rent (2005–2007)	RM110.25
(d) Interest (15 April 2002–19 November 2007)	RM17,553.84
	RM58,093.34

The respondents filed defence and counterclaimed for:

(a) failure of the appellant to manage the mall; and

(b) misuse of the management common properties in the mall by setting up structures.

[3] An application to strike out the defence and counterclaim was allowed by the learned sessions court judge on 2 October 2009 and accordingly judgment was entered against the respondents for the said sum of RM58,093.34. The respondents thereafter lodged an appeal to the High Court against the said decision of the learned sessions court judge. For reason, which neither is on record nor disclosed to us, the appeal was subsequently discontinued. Instead the respondents filed this originating summons at the High Court seeking for a declaration that the judgment of the sessions court was null and void and liable to be set aside. It was allowed by the High Court. The appellant is now appealing against the said decision of the High Court.

[4] This appeal is premised on the grounds that the High Court had erred for the following reasons. Firstly, it was contended by learned counsel for the appellant that the issue of locus standi in respect of the appellant's capacity to initiate the suit at the sessions court raised in this originating summons should not be allowed on the principle of res judicata or its more precise specie, issue estoppel. The reason for this, as we understand it, is because the respondents did not raise the said issue, though they could have, at the proceedings in the sessions court. Secondly, learned counsel also submitted that the law did not prohibit the appellant from claiming the charges as they were due and owing well before the formation of joint management body ('JMB') under the Building and Common Property (Maintenance and Management) Act 2007 ('Act 663'). Therefore the appellant contended it had, for all intents and purposes, the necessary locus standi io file the suit. For this reason learned counsel contended, the judgment of the sessions court was not illegal as alleged and should not have been set aside as being a nullity. He nevertheless argued that the respondents ought to have pursued the appeal against that decision to the High Court instead of making an application to set aside the said judgment by way of this originating summons.

[5] Learned counsel for the respondents, on the other hand, contended that the judgment of the sessions court was illegal because, upon the formation of JMB, the developer was prohibited from collecting the charges. The judgment of the sessions court according to him was in breach of Act 663 and by reason thereof was an illegal judgment and liable to be declared null and void and thereafter set aside. They argued, quite rightly that any court of law should not sanction an illegal judgment, (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75).

[6] In determining the legality of the judgment, we are mindful that this proceeding is not an appeal of the decision of the sessions court although we are bound to consider the facts presented therein. In taking this approach, we are of the view that the more precise issue in this proceeding, is whether the appellant retained its right to claim the charges incurred prior to the formation of the JMB. It is not, as suggested by learned counsel for the respondents in the written submission, which is whether the appellant loses its right per se to collect the charges upon the formation of the JMB. This appears in the respondents' written submission where it was said that 'once the JMB is formed the Appellant hands over all accounts and responsibilities in managing and maintaining the Mall to the JMB'.

[7] We have read the statement of claim of the appellant filed at the sessions court. It was not in dispute that the charges were amounts due and owing as at 19 November 2007. They were clearly incurred well before the formation of the JMB. It was also not in dispute that the JMB was formed on 28 September

2008. The appellant's claim was made pursuant to the sale and purchase agreement made between the respondents and the developer. Under the sale and purchase agreement the respondents were responsible for, amongst others, payment of the charges, the amount and manner of which were to be determined by the developer. The appellant, having been granted the developer's right, therefore claimed against the respondents the charges due and owing under the sale and purchase agreement.

[8] Learned counsel for the respondents relied on ss 5(4), 20(2), 16(3) and 22(1) of Act 663 to offer the following interpretation. He contended, reading these provisions together would show that, the appellant was only responsible to maintain and manage the mall till the formation of the JMB. The role and duties of the appellant ceased upon the formation of the JMB on 28 September 2008 and any surplus in the monies collected by the appellant shall thereafter be transferred to the JMB.

[9] We have examined the above provisions of Act 663 cited to us. We agree with the interpretation put forth by the respondents that the role and duties of the appellant ceased upon the formation the JMB but not more than that.

[10] The duty of the developer to carry out maintenance and management of the mall before the formation of the JMB is imposed by s 5(4) of Act 663. It is therefore a legal duty imposed on the developer to carry out maintenance and management of the mall before the formation of JMB. Having imposed such a duty the law is silent on the right to collect the charges by the developer. This is in contrast to the position when it imposes the same legal duty on JMB. It clearly provides under s 8 the rights of JMB to collect the charges etc from purchasers. We will discuss this matter further in the following paragraphs. Despite being silent on the right to collect the charges, the developer however is under an obligation under s 16 of Act 663 to open a building maintenance account ('BMA account') with a bank. The developer shall maintain BMA until the formation of the JMB. Each BMA account must be opened in respect of each development. The monies to be deposited into the account by the developer are stipulated under s 17(1) of Act 663.

They are:

(a) All charges received by him from the purchasers in the development area for the maintenance and management of the common property of the development area; and

(b) All charges for the maintenance and management of the common property to be paid by the Developer in respect of those parcels in the development area which have not been sold, being a sum equivalent to the maintenance charges payable by the purchasers to the Developer had the parcels been sold.

[11] Unless a BMA account is opened in the name of the developer and vacant possession is delivered, s 20 of Act 663 prohibits any collection of the charges by any person to be made.

[12] The developer's duty to maintain and manage the mall, as we have said, ceased upon the formation of JMB. Thereafter it became the duty of the JMB under s 8 of Act 663 to maintain the common property and keep it in a good serviceable repair. The JMB is empowered to collect, the maintenance and management charges from the owners, in proportion to the allocated share units of their respective parcels. It is also provided under s 22 of Act 663 that within one month of the formation of JMB, any amount standing surplus in the BMA shall be transferred to the JMB. The monies so transferred shall form part of the 'building maintenance fund', which shall be managed and maintained by the JMB.

[13] Having outlined the above, it becomes clear that the developer's right to collect charges is one that is derived under the sale and purchase agreement and the amount owed by the respondents herein are expenses incurred by the developer prior to the formation of JMB. This contractual right to collect the charges under the sale and purchase agreement remain enforceable despite the obligation to manage and maintain the building ceased upon the formation of the JMB. We say this because Act 663 does not override or transfer that contractual right to JMB.

[14] Although under s 22 of Act 663 any surplus from the BMA shall be transferred to the JMB, it does not affirmatively say that the developer's right to collect charges is likewise transferred or to use the term alluded by learned counsel for the respondents 'handed over' to the JMB. Further, we note in particular s 22(1) does not deal with any situation precedent to the formation of JMB.

[15] The right of JMB to collect the charges differs from that of the developer. Under the sale and purchase agreement, the developer's right is contractual in nature while under Act 663, JMB's right is statutory. Any failure to pay the charges to the JMB under the law would attract liabilities under s 34 of Act 663.

[16] A breach by the respondents to pay the charges under the sale and purchase agreement would entitle the parties to remedies under the contract. Thus to deny the developer its contractual right under the sale and purchase agreement would lead to a situation where the developer is denied of any recourse. As we have stated earlier although s 5(4) of Act 663 imposed a duty to maintain and manage, it did not specifically provide a corresponding right to collect the charges by the developer. Even though the duty to maintain and

manage must necessarily imply the right to collect the charges, there is no clear provision for the same under the law. The developer's right to collect the charges is only stipulated under the sale and purchase agreement. In this regards we also take judicial notice that the sale and purchase agreement is a contract sanctioned by law. It is an agreement made pursuant to reg 11 of the Housing Development (Control and Licensing) Regulations 1989. Thus to deny the developer a contractual right under a contract sanctioned by another law would lead to disarray. Beside, it would also amount to an interference with freedom to contract.

[17] The right to collect the charges granted to JMB under s 8(2) of the Act is different from the developer's right under the contract. Section 8 of Act 663 provides the JMB with the right to collect the charges in proportion to the allocated share units of their respective parcel. It is a statutory power giving authority to JMB to collect the charges. Corresponding to the right of JMB to collect, the purchasers are bound by law under s 23(1) of Act 663 to pay the charges. Failure on the part of the purchasers to pay the charges to JMB is an offence under s 34 of Act 663 punishable with a fine not exceeding RM5,000 and shall also be liable to a further fine not exceeding RM50,000 for every day during which the offence is continued after conviction. In our opinion therefore, the power to collect the charges under Act 663 is a newly created right and only commences upon formation of the JMB. It is distinct and different from the contractual right of developer under the sale and purchase agreement. For the above reason, we hold that there was no 'handing over' of the developer's right to collect the charges as submitted by learned counsel for the respondents.

[18] Any 'handing over' or transfer of contractual rights can only take effect if there is an assignment of such rights either contractually or by law. There is no evidence of an assignment of the contractual right, nor any provision in Act 663 that transfers or hand over that contractual right. In this regard, we are mindful that if the words in the statute are clear and precise, then no more can be said or inferred than those words in the ordinary sense. The claim by the appellant in the proceedings before the sessions court was premised on the contractual obligations that had clearly been breached by the respondents. The law does not prohibit the appellant from pursuing its claim, which incidentally is no more than a claim for breach of contract prior to the formation of JMB.

[19] In recognising the need to protect house buyers and consumers in general, we must adhere to the principal of fairness. The charges claimed by the appellant would have been incurred for the benefit of the respondents. The developer could not have gained profit when it is obliged under s 22 of Act 663 to transfer all surplus of monies collected from the purchases (the respondents included) to the JMB. For reasons expounded above, we therefore hold that the

appellant retains its contractual right to collect the charges, the amount of which was incurred prior to the formation of the JMB.

[20] On the mode of action adopted by the respondents, it is clear that the originating summons application to set aside the sessions court judgment was made purely to enable them to raise issue on locus standi of the appellant. The respondents ought to be estopped from raising the issue of locus standi in this originating summons application by the principle of res judicata. The attempt by the respondents to justify their failure to raise locus standi earlier at the sessions court, on the ground that they were only made aware of the formation and existence of the JMB one year later, on 28 September 2009, after the proceedings in that court was highly improbable for two main reasons. First, the JMB had commenced billing and collecting maintenance charges from the owners of parcels in the mall since its formation on 28 September 2008. The respondents being owners of a parcel at all material times ought to have been aware or deemed to be aware of the existence of JMB. Second, the composition of the JMB under s 4(1), (4) of Act 663 constitutes the developer and the owners themselves. We do not see the need to go beyond saying that the respondents and property owners in general ought to be more vigilant about protecting their rights and interests. They cannot simply come to court pleading ignorance when the evidence shows otherwise. We find that, if the learned High Court judge had properly directed himself on this material fact he would have come to a different conclusion.

[21] The respondents ought to have raised the issue of the locus of the appellant at the proceedings in the sessions court. Their failure has attracted the application of the doctrine of res judicata. The Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 had laid out the various situations on the application of the doctrine. The doctrine has the effect of creating estoppels per rem judicatum, which may take the form of either cause of action estoppel or issue estoppels. This originating summons, in our considered view, would fall squarely on the principal of issue estoppel. The respondents' challenge on the appellant's capacity in the originating summons before the High Court was based on the facts in the proceedings before the sessions court. The issue of locus standi was available to the respondents then. They could have quite easily raised it at the sessions court but did not. Otherwise there could have been and should have been an end to all proceedings between the parties herein. The respondents should not be permitted through a rather ingenious approach, to take a second bite vide by making this originating summons; it is a backdoor attempt to put forth an issue that could have been brought before the court. Such conduct cannot be condoned. There is no injustice against the respondent in the court below. If there had been any injustice in this case, it would have been to the

appellant who had expended sums of monies without recourse. The High Court ought to have dismissed this originating summons in limine.

[22] For the reasons we have given above, we say that there is no breach of statute by the sessions court when judgment was entered for the appellant on the 2 October 2009. The only available avenue left to the respondents was by way of appeal to the High Court, which they had discontinued. It is also a rule that the withdrawal of appeal by the respondents of the sessions court order left nothing more for the court to adjudicate.

[23] In the circumstances we allow the appeal by the appellant. We set aside the order of the High Court that declared the judgment of the sessions court as being a nullity. We award costs of RM5,000 to the appellant.

Appeal allowed.

Reported by Afiq Mohamad Noor